

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she should not be required to repay the overpayment, as she was not at fault in its creation.

FACTUAL HISTORY

On January 7, 2004 appellant, a 63-year-old food service worker, sustained injuries to her arm, neck and shoulder in the performance of duty. OWCP accepted her claim for right bicipital tendinitis and right shoulder strain. Appellant filed periodic claims for total disability, for which she was compensated and was placed on the periodic rolls on December 8, 2009.

The record reflects that, while on compensation, appellant received retirement benefits from the SSA. OWCP, however, failed to offset the portion of her social security benefit that was based upon her federal civilian service.

In a June 4, 2010 memorandum from the SSA, M. Pinkney indicated that appellant received SSA benefits from September 2008 through September 2010. Mr. Pinkney provided SSA rates with a Federal Employees' Retirement System (FERS) offset and without a FERS offset from for the applicable period.

The record contains a FERS and social security dual benefits calculation worksheet specifying the social security benefits appellant would have received every 28 days without FERS offset versus the amounts she should have received with FERS offset for the period September 15, 2008 through September 25, 2010. The worksheet reflects that OWCP's failure to deduct the FERS offset for the applicable period resulted in an overpayment of \$3,848.68.

By notice dated December 7, 2010, OWCP advised appellant of its preliminary determination that she received an overpayment in the amount of \$3,848.68 because she was in receipt of social security benefits attributable to her federal employment at the same time that she was receiving compensation benefits under FECA for the period September 15, 2008 through September 25, 2010.² Appellant was without fault in creating the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On January 11, 2011 appellant submitted an overpayment recovery questionnaire and requested a decision on the written record. She also requested waiver of the overpayment, contending that she was not at fault in its creation. Appellant reported monthly income from social security of \$1,075.00 and compensation benefits of \$1,277.81, for a total monthly income of \$2,352.81. She had a checking account with a balance of \$16,000.00. Appellant listed monthly expenses of \$2,317.00 as follows: utilities -- \$200.00; Navy Federal Credit Union --

² The Board notes that OWCP's preliminary determination referred to the period of the overpayment as September 15, 2008 through September 25, 2010. The accompanying overpayment calculation worksheet and other financial documents reflecting the amount appellant was paid during the applicable period, correctly reflect the period of the overpayment as being September 15, 2008 through September 25, 2010. The Board finds OWCP's reference to September 25, 2008, rather than to September 25, 2010, to be a harmless typographical error.

\$317.00; mortgage/rent -- \$950.00; food -- \$500.00; clothing -- \$150.00; other expenses -- \$200.00. She did not submit evidence supporting her claimed expenses.

By decision dated January 31, 2011, an OWCP hearing representative found that appellant received an overpayment of \$3,848.68 for the period September 15, 2008 to September 25, 2010, because her SSA retirement benefits based on federal service were not deducted from her compensation during that period. Although appellant was found to be without fault in the creation of the overpayment, the hearing representative denied waiver of the overpayment, noting that she failed to provide financial documentation to support her request. Based upon the information provided, she did not need substantially all of her monthly income to meet current ordinary and necessary living expenses.³ Further, the hearing representative noted that appellant had cash assets of \$16,000.00, from which she could immediately satisfy her overpayment obligation, if she chose to do so. OWCP determined that it would deduct \$245.00 from her continuing compensation payments to recover the overpayment.

On appeal, appellant argued that she would experience hardship repaying the overpayment. She contends that she should not be held accountable for the overpayment, because it was due to an OWCP error. Appellant also expressed a desire to present additional evidence supporting the hardship that repayment would create.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8129(a) provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵

Section 8116(d)(2) of FECA provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that --

* * *

³ The hearing representative found appellant’s monthly expenses for food (\$500.00) and clothing (\$150.00) to be excessive. He found that she had a net monthly income of \$315.96 and could, therefore, repay the amount of \$245.00 per month without hardship.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

“(2) in the case of benefits received on account of age or death under [T]itle [2] of the [SSA,] compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant received compensation benefits under FECA for the period September 15, 2008 through September 25, 2010. On June 4, 2010 SSA provided information that she earned regular retirement benefits from September 2008 through September 2010 and that a portion of her benefits were based on federal service. Consequently, appellant received an overpayment, as she received compensation benefits under FECA at the same time that she received social security benefits attributable to her federal employment.⁷

SSA provided OWCP with information regarding appellant’s benefit rate with and hypothetically without federal service from September 2008 through September 2010. Based on this information, OWCP calculated that she received an overpayment of \$3,848.68 for the period September 15, 2008 through September 25, 2010.⁸ Appellant does not challenge fact or amount of the overpayment and the record supports OWCP’s determination that she received an overpayment of \$3,848.68 for the period September 15, 2008 through September 25, 2010.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made because of an error or fact of law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁹ OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating an overpayment.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is necessary to determine whether an overpayment should be waived. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information

⁶ *Id.* at § 8116(d)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (February 1995); FECA Bulletin No. 97-9 (issued February 3, 1997) (the portion of SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits concurrently with federal retirement is a prohibited dual benefit).

⁷ 5 U.S.C. § 8116(d); *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ OWCP calculated the 28-day offset as follows: from September 5 to November 30, 2008 -- \$312.99; from December 1, 2008 to November 30, 2009 -- \$1,853.08; and from December 1, 2009 to September 25, 2010 -- \$1,682.61, for a total retroactive offset of \$3,848.68.

⁹ 5 U.S.C. § 8129(a).

¹⁰ 20 C.F.R. § 10.433(a).

within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

ANALYSIS -- ISSUE 2

When OWCP issued its preliminary determination with regard to overpayment on January 31, 2011, it advised appellant to complete an overpayment recovery questionnaire and to attach supporting financial documentation, if she wished to request waiver and explained the consequences of failing to do so. Because appellant failed to submit the requested information within 30 days, OWCP had no discretion in the matter; the law required a denial of waiver. Further, OWCP determined that, based upon the information provided, she did not use substantially all of her monthly income to meet current ordinary and necessary living expenses and noted that she had cash assets of \$16,000.00, from which she could immediately satisfy her overpayment obligation, if she chose to do so. The Board will therefore affirm the decision on the issue of waiver.

Appellant argues that, as she was not at fault in the creation of the overpayment, she should not have to make repayment. OWCP's finding that she was not at fault does not in itself entitle her to retain money that does not belong to her.¹² As appellant failed to submit the necessary financial information, OWCP was unable to determine whether her financial circumstances qualified her for waiver. Moreover, as appellant represented that she had liquid assets of \$16,000.00, her assets exceed the resource base of \$4,800.00. Therefore, recovery of the overpayment would not defeat the purpose of FECA.¹³

On appeal, appellant indicates that she would like to present evidence supporting her claim that repayment would create hardship. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, any new evidence cannot be considered by the Board.¹⁴

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the

¹¹ *Id.* at § 10.438.

¹² *P.R.*, Docket No. 10-1244 (issued January 4, 2011).

¹³ According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if it would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics. OWCP procedures provides that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹⁴ 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$245.50 every 28 days from appellant's continuing compensation.

As noted, appellant failed to submit documentation of her claimed expenses in support of her request for waiver, prior to the final overpayment decision. An overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁶ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁷ In the instant case, appellant did not submit the requested financial information. The Board finds that there is no evidence of record to establish that OWCP erred by directing recovery of \$245.50 from future compensation payments until the overpayment amount was repaid.¹⁸

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment in the amount of \$3,848.68. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly set forth the terms for collecting the overpayment from her continuing compensation payments.

¹⁵ *Id.* at § 10.441(a); see *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁶ *Id.*

¹⁷ *Frederick Arters*, 53 ECAB 397 (2002); *supra* note 13 at Chapter 6.200.4(c)(2) (June 2009).

¹⁸ OWCP considered appellant's representations regarding her expenses, even though she did not submit proper documentation. The hearing representative found appellant's monthly expenses for food (\$500.00) and clothing (\$150.00) to be excessive and reduced her monthly expenses accordingly. He found that she had a net monthly income of \$315.96 and could, therefore repay the amount of \$245.00 per month without hardship.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2011 is affirmed.

Issued: November 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board